

18 March 2021

Mr Nick Wimbush
Chair of the Fingerboards Mineral Sands Project Inquiry and Advisory
Committee
Planning Panels Victoria
1 Spring Street
Melbourne Victoria 3000

By email: Fingerboards.IAC@delwp.vic.gov.au;

Dear Mr Wimbush,

Fingerboards Mineral Sands Project

We continue to act for Kalbar Operations Pty Ltd.

We refer to the letter to the IAC on behalf of East Gippsland Shire Council, dated 18 March 2021. As correctly stated in that letter, the parties have been unable to reach agreement on the form of any template to be provided to the experts.

For substantially the same reasons as set out in its written response to MFG's submissions under Direction 59, Kalbar considers there is no legal requirement for the IAC to consider, and no utility in the IAC considering, the environmental effects of a tailings storage facility in circumstances where Kalbar does not propose to proceed with that option. In short, these are that:

- Under its Terms of Reference, the fundamental task of the IAC is to 'hold an inquiry into the environment effects of the project'. In circumstances where Kalbar is no longer proposing to construct a tailings storage facility as part of the project, it is difficult to see how the impacts of such a facility could be characterised as 'environmental effects' of the project; and
- While the Terms of Reference do require consideration of the exhibited EES, it is only one piece of information (albeit an important one) which informs the IAC's recommendations and findings, and does not define the project for the purposes of the Minister's subsequent assessment. In this regard, it is significant that the Terms of Reference specifically contemplate the IAC receiving 'information provided by the proponent that responds to submissions' and requires the IAC to report on 'feasible modifications' to the project.

Kalbar's proposed approach is consistent with the experience of Kalbar's representatives in relation to assessment of major transport and other projects where the design of the Project is refined over time, including by Technical Notes introduced during the course of the public hearing, to avoid and minimise impacts on matters of environmental significance. For example, in the recent North East Link Project hearing, Technical Notes were produced which addressed alternative designs for several intersections as well as relocated sports facilities.

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Such an approach furthers the overall objective of the EES process, which is to avoid and minimise impacts where possible, and, if done in a procedurally fair way, does not raise any legal concerns.

By contrast, Kalbar is unaware of any matter in which an IAC has proceeded on the basis that it must consider an option that the proponent of a project has expressly disavowed, and has no intention of developing. Kalbar considers such an approach is inconsistent with the general rule that administrative decision-makers should focus on the substance of the matters in dispute, rather than formalities.

While Kalbar would be content with a template that was silent on the question of whether the experts were required to consider the impacts of the tailing storage facility (and thus effectively left it to the discretion of the participating experts), it does not support Council's preferred form of the template which, in substance, mandates consideration of those effects.

Having said, Kalbar will of course abide by any direction that the IAC chooses to give.

Yours sincerely,



Tim Power
Partner

